IN THE

Supreme Court of the United States

October Term, 1961

No. 11

HERMAN LIVERIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the Court of Appeals (R. 136-146) is reported at 280 F. 2d 708. The District Court wrote no opinion.

Jurisdiction

The judgment of the Court of Appeals (R. 147) was entered on June 18, 1960 (R. 147). The petition for a writ of certiorari was timely filed on August 16, 1960, and granted on June 19, 1961. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

Questions Presented

Petitioner, a director of a television station in New Orleans, was convicted of contempt under 2 U. S. C. 192,

fined and sentenced to three months imprisonment for refusing to answer certain questions at a hearing of the Internal Security Subcommittee of the Senate Judiciary Committee.[1] The questions presented are:

1. Whether the indictment of petitioner under 2 U. S. C. 192 was invalid in view of its failure to state (a) the subject under inquiry[2] by the Subcommittee at the time of the alleged contempts, (b) the pertinency to that subject of the indictment questions, (c) the willfulness of petitioner's failure to answer the questions and (d) the Subcommittee authority.

2. Whether the Government sustained its burden at the trial of showing the subject under inquiry when petitioner failed to answer the indictment questions and the pertinency to that subject of those questions.

3. Whether petitioner was adequately apprised at the Subcommittee hearing of the subject under inquiry and the pertinency of the questions.

4. Whether the Government sustained its burden of showing probable cause for summoning petitioner as a witness before the Subcommittee and for subordinating his right of privacy to the public interest, if any, involved.

5. Whether petitioner at the trial was denied the rights to a full and fair defense and of cross-examination guaranteed defendants in all criminal cases.

6. Whether Senate Resolution 366, 81st Cong., 2d sess., the charter of authority of the Subcommittee, is so vague

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[1] The Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Committee on the Judiciary of the United States Senate, herein designated "the Subcommittee" or "the Internal Security Subcommittee".

[2] To distinguish the "question under inquiry", as that term is used in 2 U. S. C. 192, from the actual questions put to petitioner as to which contempts were charged (hereinafter sometimes "the indictment questions"), we use the term "subject under inquiry" or "subject of inquiry" in lieu of the statutory term "question under inquiry".

as to invalidate the Subcommittee's power to compel testimony in the First Amendment area.

7. Whether an investigation by the Subcommittee into the "Communist Party strategy of placing its disciples in key positions in the fields of communications, news-gathering and reporting, education and other areas in which public opinion could be influenced" violated the freedoms guaranteed by the First Amendment.

8. Whether Senator Eastland, before whom the contempts charged to petitioner were allegedly committed, constituted a competent committee of the Senate within the purview of 2 U. S. C. 192.

9. Whether, in this case, involving questions relating to Communist Party membership and affiliation, petitioner was improperly denied the right to show the bias of Federal Government employee jurors and, on such a showing, to have the indictment returned by a grand jury composed in the majority of such Federal Government employees dismissed and such employees excused for cause from service on the petit jury.

10. Whether, since evidence *aliunde* was introduced to prove pertinency of the indictment questions to the subject under inquiry, the issue as to pertinency should have been submitted to the jury.

Statement of the Case

Petitioner, a director of a television station in New Orleans, was convicted for contempt under 2 U. S. C. 192, for refusal to answer fourteen questions at a hearing of the Subcommittee held on March 19, 1956, in Washington, D. C. (R. 1-3).[3]

[3] Petitioner was indicted for refusal to answer fifteen of the questions put to him at the hearing. At the trial, the court granted petitioner's motion for a judgment of acquittal with respect to Count 15.

The transcript of the Subcommittee hearing appears at R. 17-50.

Petitioner was first interrogated in a closed, executive session before Senator Eastland, at which the Count 1 and Count 2 questions were put. During this session (R. 17-21), no statement was made as to the nature of the Subcommittee's inquiry.[4]

On the same afternoon, petitioner was summoned to an open, public session, again before Senator Eastland. At the commencement of that session, Subcommittee counsel Morris read a statement which, he said, had been made by the Subcommittee chairman on a previous occasion and set forth "the purpose of the particular series of hearings" in process. The statement is extraordinarily vague and general (R. 22):

> "We shall try to determine to what extent Soviet power operates through the Communist Party here and to what extent other organizations have been devised to effectuate its purposes. We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures.
>
> "Under consideration during these hearings will be the activities of Soviet agents and agencies registered with the Department of Justice and such other agents or agencies not now registered whose activities may warrant legislative action.
>
> "We shall endeavor to determine to what extent this Soviet activity here is calculated to contribute to Soviet expansion abroad and to what extent it is working to undermine the structure and the composition of our own Government here, as the facts bearing on these isues are gathered in the public record of this subcommittee which will enable it to make

[4] At the trial, Subcommittee counsel and Government witness Morris conceded that petitioner was not advised of the subject under inquiry either prior to or during this executive session (R. 64).

> recommendations or determinations as to whether the Internal Security Act of 1950 and other existing law should be repealed, amended or revised, or new laws enacted."

Thereafter, during the course of the hearing, various statements as to subject of inquiry were made from time to time, both by Senator Eastland and by Subcommittee counsel; their diversity and inconsistency indicating that the Subcommittee had not in fact determined upon any particular subject of inquiry. Soon after the commencement of the public session, petitioner reiterated objections which he had earlier interposed, to the jurisdiction and power of the Subcommittee to question him as to his personal affairs and political opinions and beliefs (R. 28, 41-50). Senator Eastland, regarding those objections as, at least in part, directed to the issue of pertinency, insisted that the questions put were "pertinent to this inquiry" and stated (R. 33):

> "The question, Mr. Liveright, is very pertinent. We are attempting to see what amendments are needed to the Internal Security Act. In addition, and as part of that, we are tracing the activities of the Communist Party in this United States."

Shortly thereafter, in connection with the Count 9 question, Senator Eastland stated that the Subcommittee wished "to know how this [Communist] conspiracy is financed" (R. 36) and that the purpose of the inquiry was to enable the Subcommittee to draft "legislation to protect the welfare and the safety of our country" (R. 37).

Earlier, after inquiring into petitioner's educational and employment history, Morris, addressing Senator Eastland, had stated that the "purpose of subpoenaing this witness and asking him the following questions is to determine to what extent * * * [petitioner's] activities had been carried out in New Orleans in the framework of the

Communist Party and to what extent they have been carried out in some other framework" (R. 32).

The interrogation of petitioner related to petitioner's political associations, including questions whether he had been a member of the Communist Party in 1943 (thirteen years prior to the Subcommittee hearing) and whether he was at the time of hearing, in 1956, a member of or affiliated with the Party. Protesting that the Subcommittee had no jurisdiction or power to inquire into such associations, petitioner refused to answer such questions.

Petitioner was indicted for contempt on November 26, 1956 (R. 1-3). Thereupon, he moved to dismiss the indictment on the grounds, *inter alia,* (a) that the indictment was invalid for failure to allege the subject under inquiry by the Subcommittee at the time of the alleged contempts and the pertinency to that subject of the questions put to petitioner, and (b) that the indictment was void in that more than twelve members of the indicting grand jury were Federal Government employees and, because of the fear engendered by the Government's loyalty and security programs, actually prejudiced and biased against petitioner (R. 4-8). An affidavit of petitioner's counsel was filed in support of the charge of bias. Petitioner requested that if the indictment were not dismissed on that ground, a preliminary hearing should be held at which he might "offer proof, by examination of grand jurors and otherwise, that bias or prejudice existed on the part of more than twelve members of the grand jury who concurred in the Indictment" (R. 8). The trial court denied the motion to dismiss and the alternative request for a hearing to examine into the bias of the grand jury (R. 10).

Prior to the trial, subpoenas were issued to the Subcommittee's chief counsel and the Senate Clerk directing that they produce, *inter alia,* all Subcommittee records relating to petitioner and minute books covering the series

of investigations and hearings in the course of which petitioner had been summoned (R. 8-9). On the Government's motion, the trial court quashed these subpoenas (R. 10-11). In view of this ruling, petitioner moved that the indictment be dismissed for denial of an opoprtunity to petitioner to make a full and fair defense. This motion was denied by the Court (R. 53).

The case was tried to a jury, on which Federal Government employees served, the court having previously denied petitioner's motion to disqualify such employees for cause (R. 10).

At the commencement of the trial, over petitioner's objection, the court ruled that both the issues (a) as to pertinency of the questions to the subject under inquiry and (b) as to the competence of the Subcommittee at the time of the inquiry, were for the court and that no testimony relating to those issues might be adduced before the jury (R. 53-54).

Robert Morris, the Subcommittee's chief counsel, was the Government's only material witness. Before the jury, Morris read the transcript of petitioner's testimony (R. 54-56, 17-50). Before the court, the jury having been excused, Morris testified as to (a) information allegedly in the Subcommittee's file which, so he stated, had caused it to summon petitioner as a witness, (b) the purported purposes of the Subcommittee's inquiry, and (c) the Subcommittee's authority and procedures (see R. 56-123, *passim*).

Morris' testimony is considered in detail in connection with the several points of the Argument, *infra*. As to the cause for summoning petitioner, Morris testified in substance that the Subcommittee had been informed that petitioner had been "active in Communist activities in New York" and had been sent to New Orleans as "a secret member of the Communist Party in New Orleans" (R.

76-78; see, also, R. 79, 80, 81, 97-98, 99). When, however, petitioner sought to cross-examine as to the veracity of the witness and the details and sources of that information and to inspect it insofar as it may have been in writing, the trial court barred him from doing so (R. 97-98, 100, 117). In view of these limitations on cross-examination, petitioner moved that Morris' testimony be stricken (R. 123-125). The Court denied this motion (R. 125).

As to the subject under inquiry by the Subcommittee, Morris' testimony was, in substance, that the subject of the Subcommittee's inquiry at the time of petitioner's appearance was the same as it had been at all times—"the activities of the Communist organization as it operates within the United States" (R. 90). He said that the Subcommittee had in fact not confined itself to any particular purpose (R. 112), but instead had considered the subject under inquiry coextensive with the broad terms of its enacting Resolution (R. 93-94, 101-102).

Morris' testimony in this regard was consistent with the Government's theory of the case. Throughout the trial, the Government prosecutor firmly and consistently took the position that there was no subject under inquiry here narrower than the broad terms of Senate Resolution 366; that there "is no such thing as a matter under inquiry, anything more narrow than the full powers of the committee" (R. 58); that "there is no single subject and scope" (R. 60).

Petitioner's motion for a judgment of acquittal at the close of the Government's case was denied (R. 126-127).

Opening his case, petitioner vainly renewed his request for enforcement of the subpoenas previously issued to the Subcommittee and the Senate (R. 127). Petitioner then made a proffer of proof, stating that the subpoenaed materials would prove, *inter alia*, that the Subcommittee had no reason to summon petitioner; that the Subcommit-

tee, in its inquiry, was engaged not in a legislative purpose but solely in an effort to harass petitioner and to expose him to the contempt of his associates and the public; that the Subcommittee was not acting with the least possible power commensurate with legislative purposes; and that petitioner's First Amendment rights had been impaired without justification (R. 127-129).

Petitioner's motion for acquittal at the close of the case was denied (R. 130-131).

Over petitioner's exceptions, the court submitted the case to the jury, charging as matters of law (a) that Senator Eastland, sitting alone, was, at the time and place of the inquiry involved, a duly constituted committee of the Senate inquiring into a matter within duly delegated authority and (b) that the indictment questions were pertinent to the subject under inquiry by the Subcommittee (R. 131-134). The court did not, however, specify the nature of the Subcommittee's subject under inquiry.

The jury returned a verdict of guilty on each of the counts submitted to them, Counts 1 through 14.[5] On March 22, 1957, the trial court entered a judgment of guilty and imposed sentence of a $500 fine and three months imprisonment (R. 12).

Notice of appeal to the Court of Appeals was filed on March 22, 1957 (R. 12). On June 18, 1960, the Court of Appeals affirmed the conviction (R. 147), on an opinion which, as to the nature of the subject of inquiry, was markedly different from the Government's position on the trial. See *infra*, pages 21-24.

This Court granted certiorari on June 19, 1961.

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[5] The court left to the jury only the issues (1) whether the indictment questions had been put to petitioner, (2) whether petitioner had refused to answer them, and (3) if so, whether his refusal was a willful refusal (R. 132).

Summary of Argument

I

The indictment here charged that petitioner "unlawfully refused" to answer questions "pertinent to the question then under inquiry" before the Subcommittee. It did not state the subject of the inquiry which the Subcommittee was conducting, its authority to conduct that particular inquiry, the respects in which the questions set forth in the indictment were pertinent to the subject of inquiry and the fact that petitioner's refusal to answer was willful.

The indictment in this case is, therefore, insufficient in that it is couched in generic terms and in that it fails to state essential elements of an offense under 2 U. S. C. 192. Petitioner here relies on Argument I in the brief for petitioner in *Price* v. *United States,* No. 12, this Term, and requests reversal of the conviction on the authorities there presented.

II

Reversal is also required by reason of the Government's failure at the trial to show the subject of the Subcommittee's inquiry and to establish the pertinency of the indictment questions. In a prosecution under 2 U. S. C. 192, the Government has the duty to prove the pertinency of the questions, and the first step in doing so is to show the subject of inquiry. The trial record in this case—the transcript of the Subcommittee hearing and the testimony of Subcommittee counsel and Government witness Morris—fails to supply a satisfactory explanation of subject under inquiry. The statements at the hearing attributed to the Subcommittee relating to subject of inquiry are vague and general. Both the Government prosecutor and Subcommittee counsel at the trial conceded that they furnish no precise definition of the subject under inquiry.

The Government's theory of prosecution was that there was no particular subject and that the subject of inquiry here was as broad and no more narrow than the full powers of the Subcommittee enunciated in its charter, Senate Resolution 366.

Senate Resolution 366, however, offers no greater enlightenment as to the nature of the Subcommittee's inquiry in this case than did the charter of the House Committee in *Watkins* v. *United States,* 354 U. S. 178, of which this Court said, "it would be more difficult to imagine a less explicit authorizing resolution" 354 U. S. at 202. Comparison of both resolutions discloses, that, if anything, Resolution 366 is more imprecise than the House charter.

It is plain from the record here that neither the Subcommmitee at the hearing nor the Government at the trial deemed it necessary to establish or prove a particular subject of inquiry. The subsequent efforts of the Court of Appeals to supply this lack are futile because they are not supported by the record and they suffer from the infirmity of *post litem motam* self-serving declarations.

No subject of inquiry having been shown, there was, of course, no proof of pertinency.

In view of the Government's failure in these respects and the failure of the trial court to find a subject of inquiry, the conviction must be reversed.

• • • •

The failure to delimit the subject of inquiry requires reversal also because the nature of that subject and the pertinency of the questions were not made luminous to petitioner at the time he appeared before the Subcommittee. Whatever may have been the form of the objections lodged by petitioner at the Subcommittee hearing, Senator Eastland, purportedly sitting as the Subcommittee, understood them to be, at least in part, directed to the issue of per-

tinency. Thus, the obligation of the Subcommittee clearly to state the subject under inquiry and the pertinency of the questions was "triggered off". Senator Eastland sought to explain how the questions were pertinent. Unfortunately, however, his endeavors were unavailing, for his explanation was in such general terms, it fell far short of the standard for precision imposed by the decisions of this Court.

III

Petitioner was unduly restricted in his right to cross-examination with respect to the issue of probable cause.

As this Court has made clear, the Government was required to establish the circumstances which in its view constituted probable cause for subpoenaing petitioner as a witness before the Subcommittee. Proof of probable cause is material to a prosecution under 2 U.S.C. 192.

The Government made an attempt to sustain its burden in this respect by adducing testimony that the Subcommittee had received certain information concerning petitioner's activities and associations. Plainly, petitioner was entitled to test the veracity of the Government's witness and to determine whether such information existed and whether there was probable cause for subpoenaing petitioner. Notwithstanding, the trial court quashed a subpoena issued to Subcommittee counsel directing the production of such information and barred reasonable cross-examination on the details and sources of the information testified to on direct examination. This obstruction of petitioner's rights to engage in reasonable cross-examination and to make a full defense violated fundamental rights of petitioner as a defendant in a criminal prosecution.

Reversal of the conviction is required by reason of this error at the trial.

IV

Senate Resolution 366, the charter of the Subcommittee, is unconstitutional and vague thereby impairing petitioner's First and Fifth Amendment freedoms. On this point, petitioner here relies on Argument VI in the brief of petitioner in *Price* v. *United States,* No. 12, this Term, and requests reversal on the authorities there presented.

V

As previously indicated, there has been no showing in this case of a subject under inquiry by the Subcommittee at the time of petitioner's appearance. Nevertheless, the Court of Appeals has found "the subject of the investigation to be Communist Party tactics, infiltration and penetration into geographical areas and into particular professional groups including communications media." If that was the subject of inquiry here, we are presented with an investigation by a Congressional committee in violation of First Amendment freedoms.

On this point, we adopt and respectfully refer the Court to the discussion in Argument I of the brief for petitioner in *Shelton* v. *United States,* No. 9, this Term (pp. 29-57).

VI

The tribunal before which petitioner allegedly committed the contempts charged was not a competent committee of the Congress contemplated by 2 U. S. C. 192. This, for two reasons:

(1) Senator Eastland, who purported to sit alone as the Subcommittee, sat at a time when the Senate was in session and without first having secured leave from the Senate to sit at that time. The hearing consequently was held in violation of Section 134(c) of the Legislative Reorganiza-

tion Act of 1946, which prohibits Congressional committees (except the House Committee on Rules) from sitting while the Senate or the House is in session without special leave of the Senate or the House, as the case may be.

Contrary to the holding of the Court of Appeals, this infirmity in the authority of the Subcommittee was a matter available to petitioner as a defense. Section 134(c) was intended, at least in part, to protect the rights of witnesses before Congressional committees. For, it is most essential for such witnesses that all committee members, or as many as possible, attend committee hearings, so that the interests of the private witness in remaining silent can be carefully weighed against the countervailing interest of the Congress in securing information at the expense of his First Amendment freedoms.

(2) Senator Eastland, purporting to sit alone as the Subcommittee, failed to comply also with section 133(f) of the Legislative Reorganization Act of 1946, insofar as the executive session of the hearing was concerned (at which the Count 1 and Count 2 questions were put to petitioner). That provision of the 1946 Act required that all hearings of the Subcommittee be open to the public except where the committee by a majority vote orders an executive session. It is undisputed that an executive session was not so ordered here.

VII

The indictment returned here was invalid because a majority of the grand jurors who returned it were Federal Government employees.

Prior to the trial, petitioner moved to dismiss the indictment upon an affidavit affirmatively showing that, because of their fears by reason of the Federal loyalty and security programs, there was actual bias and fraud on the part of thoes jurors. Alternatively, petitioner moved for a hear-

ing at which he might offer testimony to show such bias. The District Court denied these motions.

Dismissal of the indictment on the ground advanced by petitioner, or, at the least, the holding of the preliminary hearing to permit petitioner to show the bias of the Federal Government grand jurors was required by this Court's decisions in *Frazier* v. *United States,* 335 U. S. 497, and *Dennis* v. *United States,* 339 U. S. 162.

The refusal of the District Court to dismiss the indictment or to convene such a preliminary hearing requires reversal of petitioner's conviction.

VIII

In view of the fact that the Government at the trial of this case adduced oral testimony on the issue of pertinency, that issue was one of fact and should have been submitted to the jury. The trial court's withdrawal of the issue from the jury requires reversal of the conviction here.

We are aware of this Court's decision in *Bratten* v. *United States,* 365 U. S. 431, that the question of pertinency is one of law for determination by the court. We respectfully suggest, however, that the application of the *Sinclair* rule to a case such as the instant one, where evidence *aliunde* was introduced to prove pertinency, is misplaced.

I.

The indictment was insufficient because it failed to set forth essential elements of the crime: subject matter of inquiry, pertinency, willfulness and Subcommittee authority.

The indictment against petitioner alleged only that, as a witness before the Subcommittee, he was asked questions "which were pertinent to the questions then under inquiry" and that he "unlawfully refused to answer those pertinent questions" (R. 1).

The indictment was, therefore, insufficient. This, because it stated the offense merely in the generic term of the statute and, more significantly, because it failed to set forth essential elements of the crime: the subject of the inquiry, the respect in which the questions were pertinent, that the refusal to answer was a willful one and that the Subcommittee had authority to take testimony. Petitioner's motion to dismiss the indictment for these defects was denied (R. 10).

On this point, petitioner relies on Argument I of the brief for petitioner in *Price* v. *United States,* No. 12, this Term, and requests reversal on the authorities there presented.

II.

The Government at the trial failed to show the subject of the Subcommittee's inquiry and to establish the pertinency of the indictment questions. Furthermore, these matters were not made "luminous" to petitioner at the time of the Subcommittee's hearing.

In a prosecution under 2 U. S. C. 192, the Government has the "duty at the trial to prove that the questions propounded by the congressional committee were in fact 'pertinent to the question under inquiry' by the committee",

and the "first step in proving that component of the offence * * * [is] to show the subject of the subcommittee's inquiry" at the time the indictment questions were put to this witness. *Deutch* v. *United States*, 367 U. S. 456 (prelim. print), 81 S. Ct. 1587. Precise delineation of the subject under inquiry is essential not only to assure due process to the defendant but also to enable the courts, in a prosecution under 2 U. S. C. 192, to determine whether the indictment questions were in fact "pertinent to the question under inquiry" and a conviction in the particular case justified. As Mr. Justice Frankfurter stated, concurring in *Watkins* v. *United States*, *supra*, 354 U. S. at 217:

> "* * * the scope of inquiry that a committee is authorized to pursue must be defined with sufficiently unambiguous clarity to safeguard a witness from the hazards of vagueness in the enforcement of the criminal process against which the Due Process Clause protects. The questions must be put with relevance and definiteness sufficient to enable the witness to know whether his refusal to answer may lead to conviction for criminal contempt and to enable both the trial and the appellate courts readily to determine whether the particular circumstances justify a finding of guilty."

The Government failed to make the necessary showing in this case.

The trial record on the issue of pertinency consists of the transcript of the Subcommittee hearing and the testimony of Subcommittee counsel Morris. Neither the transcript nor Morris' testimony supplies a satisfactory particularization of subject under inquiry. On the contrary, both exhibit such an utter disregard of the need for precision and such hopeless confusion as to make it impossible to adduce the subject of the Subcommittee's inquiry at the time, if indeed there was any.

As we have indicated (*supra*, p. 4), petitioner was not advised at all as to the nature of the Subcommittee's inquiry prior to or during the executive session, at which the Counts 1 and 2 questions were put to him (R. 17-21, 64). At the commencement of the open, public session, Morris read the statement quoted above, *supra*, pp. 4-5, purporting to set forth the "purpose of the particular series of hearings" being held by the Subcommittee (R. 21). That statement, however, is in the most general terms and encompasses a full investigation of the Communist Party and of Soviet activity, both here and abroad (R. 22).

The generality of the "opening statement" was compounded by the equally broad statements made by Senator Eastland shortly thereafter. Senator Eastland said that the Subcommittee was "attempting to see what amendments are needed to the Internal Security Act" and, "as part of that, * * * tracing the activities of the Communist Party in this United States" (R. 33). Later, Senator Eastland sought to justify a question by defining the Subcommittee's purpose as a desire "to know how this * * * [Communist] conspiracy" is financed so that it might be enabled "to draft legislation to protect the welfare and the safety of our country" (R. 36-37).

This is the sum of the statements at the hearing relating to the subject of the inquiry attributed to the Subcommittee.[6] At the trial, both the Government prosecutor

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[6] The remarks of counsel Morris, directed to Senator Eastland, that the purpose of interrogating petitioner was "to determine to what extent * * * [his] activities have been carried out in New Orleans in the framework of the Communist Party and to what extent they have been carried out in some other framework" (R. 32) were not shown to have been authorized by the Subcommittee or to have reflected a Subcommittee decision. There is no suggestion that Subcommittee counsel was authorized to establish subjects of inquiry for the Subcommittee.

and Subcommittee counsel Morris conceded that such statements did not in any wise furnish a precise definition of the subject under inquiry, within whose frame of reference the issue of pertinency could be resolved.

Throughout the trial, Morris persistently rejected efforts of petitioner's counsel to ascertain the particular subject under inquiry. He vigorously insisted that at the time petitioner appeared, the subject was no different from and no more specific than that in which the Subcommittee had continuously engaged since 1951, when first established —"the investigation of the Communist movement within the United States (R. 86). Asked whether the inquiry as to petitioner represented "a separate investigation", he replied unequivocally, "No, it did not" (R. 89). He testified, as follows (R. 90, emphasis supplied):

> "This investigation, as I say, it is continuous and unchanging. *The subject matter of the investigation at all times is the activities of the Communist organization as it operates within the United States.*"

The hearing at which petitioner testified, Morris said, was "part of a continuing investigation • • • a *one entity which never terminates, and which is broken down solely for purposes of administration and editorial work* • • • [*and*] *putting out annual reports*" (R. 93, emphasis supplied.[7]

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[7] Morris dismissed the varying editorial headings under which the testimony of Subcommittee witnesses was published as meaningless so far as definition of subject under inquiry was concerned. Thus, although petitioner's testimony was published in the series entitled "Scope of Soviet Activity" and another witness' (William Price's) in the series designated, "Strategy and Tactics of World Communism, Communist Activity in New York", Morris testified that such differences were matters solely of "editorial distinction" and that the hearings of *all* witnesses were held within the *very*

In short, however diversely the Subcommittee may have designated its several investigations, the subject of all was the same: "the activities of the Communist organization * * * within the United States" (R. 90).

Government witness Morris' testimony in this regard was wholly consistent with the Government's theory on the prosecution of this case. No sooner had petitioner's counsel begun to examine into the subject under inquiry than

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same subject "framework" (R. 85, 86, 91). His testimony was, as follows (R. 90, emphasis supplied):

> "At every year and sometimes during the year, for the purposes of our rendering reports, and for the purposes of our having editorial distinctions made, for the purpose of issuing our publications, we very often give a different title to the series of hearings. It adds interest to the work of the subcommittee; *but it in no way changes the nature of the underlying investigation.*
>
> "Now at the particular time of February 1, 1956, not only was a new legislative committee year beginning, but there was a new chief counsel, and it was just a device the subcommittee undertook in order to present a new facet to the same work that had been going on all these years."

The editorial heading variations were designed, Morris said, merely to keep the Senators' interest from flagging:

> "* * * It has to be different * * * in order to make it presentable, or to keep interest alive in the thing, you have to keep changing the framework.
>
> " * * the senators, being human beings, like to have the thing presented in different ways—the committee evidence." (R. 102)
>
> * * *
>
> "And very often, senators being human beings, if evidence comes in, we like to put things relating to the same particular subject in the same series of hearings.
>
> "Now if you are talking about a newspaper investigation, you like to put all the newspapers in together; and if you are talking about Communists in government, you put all of those together. But *it is the same investigation*, even though you may issue separate reports on them." (R. 93, emphasis supplied)

the prosecutor, insisting that such an examination was irrelevant, succinctly stated, as follows:

> "• • • the power this committee had and the business it was investigating was the entire breadth of its powers under Resolution 366. *And at no time has this since been narrowed down to any particular subject, such as a topic, or a particular geographic location, or a particular and a narrower activity. There is no such thing as a matter under inquiry, anything more narrow than the full powers of the committee*" (R. 58, emphasis supplied).

This was the Government's view throughout. It never attempted to show, because it deemed it unnecessary to show, any particular subject under inquiry. It regarded the entire breadth of Resolution 366 as the ever-continuing and unchanging subject of investigation by the Subcommittee, and all questions put to petitioner pertinent so long as they came within the vast umbrella of that Resolution's general grant of power. "*Our position*", the prosecutor stated, "*is that there is no single subject and scope*" (R. 60, emphasis supplied).

The trial court apparently shared this view. For, although it charged the jury that the questions put to petitioner were pertinent, it never troubled to say to what subject they were pertinent. The Court observed that the questions were "generally with reference to the subject of Communism" (R. 72), an area coextensive with the scope of the authorizing Resolution; petitioner's conviction was therefore justified even though no particular subject under inquiry was proved.

In light of (a) the Government's insistence at the trial that there was no particular subject under inquiry by the Subcommittee in this case, (b) the disclaimer by its only witness of any such specific subject, (c) the ready acceptance of the Government's view by the trial court and (d) the court's failure to make any finding of a particular sub-

ject; the opinion of the Court of Appeals sustaining the conviction is plainly nothing more than judicial afterthinking. *Cf. Deutch* v. *United States, supra,* 81 S. Ct. at 1595.

The opinion of the Court of Appeals appears first to suggest that the subject under inquiry was "the Communist Party strategy of placing its disciples in key positions in the fields of communications, news-gathering and reporting, education and other areas in which public opinion could be influenced" (280 F. 2d at 712). This the Court apparently divines from the fact that "volunteered testimony of Winston M. Burdett, a prominent foreign correspondent and radio and TV newscaster, who appeared before the Subcommittee in 1955, had disclosed to the Subcommittee a widespread effort of the Communist Party to place persons under its discipline in positions of key importance in news-gathering and news dissemination media, including radio, television and newspapers" (280 F. 2d at 711), and that the Subcommittee had thus been made aware of such infiltration (280 F. 2d at 712).

If, in fact, this was the subject under inquiry at petitioner's hearing—and there is no proof it was—petitioner's conviction can hardly be justified. For, not a single one of the indictment questions is germane to an inquiry into Communist Party infiltration in "the fields of communications, news-gathering and reporting, education and other areas in which public opinion could be influenced", nor does the record show how any of the questions could possibly be pertinent to such a subject.

At the trial, Morris did say that a statement read at a previous Subcommittee hearing, on January 4, 1956, referring to the Burdett testimony (R. 87-88), was "similar in content" to or "the same thing" as the "opening statement" read at the commencement of the public session

here (R. 86, 88) and he casually characterized the investigation here as one into "Communist penetration into the field of communications" (R. 97, 101). But the Burdett testimony was not even once mentioned during the entire course of the Subcommittee hearing, and there was not the slightest suggestion at the time that the Subcommittee was in the least interested in Communist infiltration into communications media. It is significant also that when Burdett testified, in June, 1955, almost a year before petitioner was summoned, he did not mention petitioner at all. The Court of Appeals points this out (280 F. 2d. at 711):

> "* * * Burdett gave the Subcommittee names and details of Communist Party infiltration, activities and techniques. Burdett did not give information about appellant [i.e., petitioner]."[8]

Having formulated the subject under inquiry by reference to the earlier Burdett testimony, the Court of Appeals then inexplicably shifts to another and different for-

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[8] It is noteworthy also that J. G. Sourwine, who was the Subcommittee's chief counsel at the first series of hearings arising from the Burdett testimony, expressly disclaimed that Communist infiltration into the field of communications was the subject of the Burdett-inspired hearings. When the first witness at those hearings, James S. Glaser, remarked that the New York Times had reported that the "announced reason for this hearing was an intent to investigate Communist infiltration of the press and other forms of communication", Mr. Sourwine declared:

> "For your information, the committee has made no such announcement. It is not accurate * * *" ("Strategy and Tactics of World Communism", Hrgs. before Subcommittee, 84th Cong., 2d sess., Part 17, p. 1616).

During the interrogation of a later witness at the same series of hearings, Sourwine defined the subject under inquiry in the same broad terms as those on which the Government insisted during the trial of this case:

> "The subject matter of the committee's inquiry is Communist activity and the committee is proceeding on the basis of previous testimony and information furnished to it with respect to Communist activity" (*Id.* at 1652).

mulation. It suggests that the subject under inquiry was "Communist Party tactics, infiltration and penetration into geographical areas and into particular professional groups including communications media" (280 F. 2d at 713). It then states: "Assuming, arguendo, that the subject covered by the Senate Resolution was, in this case, not sufficiently specific and concrete * * *, the opening statement * * * carefully pointed out at least one narrow and specific area or subject of inquiry * * * 'the structural revisions that the Communists have made in their network in order to avoid detection, and * * * to trace the movement of individual agents through these changing structures' " (*Ibid.*).

Comparison of the "opening statement" with Senate Resolution 366, however, demonstrates that the statement is no more than an expanded paraphrase of the Resolution. Cf. *Deutch* v. *United States, supra,* 81 S. Ct. at 1592; *Barenblatt* v. *United States,* 252 F. 2d 129, 136, aff'd 360 U. S. 109. The Government prosecutor conceded this, remarking that the "opening statement was about as broad as the entire authority of the committee" (R. 118). The trial court agreed: " * * * I don't see how it can much broader * * * " (R. 118). The one sentence which the Court of Appeals excerpts from the statement— "We shall study the structural revisions that the Communists have made in their network in order to avoid detection, and endeavor to trace the movement of individual agents through these changing structures"—abounds in the same generalities as does the authorizing Resolution; it is certainly no more precise.

The record inevitably leads to the conclusion, therefore, that the frame of reference on which the Government relied for proof of pertinency in this case was Senate Resolution 366 and that alone. Unless that Resolution affords a definition of the subject under inquiry adequately precise to satisfy the requirements for conviction under 2 U. S. C. 192, the conviction of petitioner cannot stand.

Resolution 366, however, offers no greater enlightenment as to the subject of inquiry in this case than did the charter of the House Committee on Un-American Activities in *Watkins, supra.* Of the latter, this Court said, "it would be more difficult to imagine a less explicit authorizing resolution." *Watkins, supra,* 354 U. S. at 202. If anything, the Senate Resolution is even more imprecise than the House charter. The House resolution, in pertinent part, authorizes the House Committee to investigate

> "* * * the extent, character, and objects of un-American propaganda activities in the United States * * * the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and * * * all other questions in relation thereto that would aid Congress in any necessary remedial legislation" (*Id.* at 201-202).

The pertininent portion of the Senate resolution empowers the Subcommittee to investigate

> "* * * the administration, operation, and enforcement of the Internal Security Act of 1950 * * * [and] of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and the extent, nature and effects of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign governments or organizations controlling the world Communist movement or any other movement seeking to overthrow the government of the United States by force and violence" (*infra,* pp. 50-51).

A former chairman and vigorous champion of the Subcommittee, Senator Jenner, frankly conceded that it was hopeless to look to the authorizing Resolution for any com-

prehension of the subject at any time under inquiry. Senator Jenner said:

> "* * * the Subcommittee on Internal Security was set up by resolution primarily to look after the internal security of the United States. However, it must be realized that *it is hard to draw a line indicating where the subject begins and where it ends*" (100 Cong. Rec. 843, emphasis supplied).

Subparagraph (3) of Senate Resolution 366, which the court below found especially explicit (*Shelton* v. *United States*, 280 F. 2d 701, 704), embodies a grant of power quite like that in the New Hampshire enabling resolution stricken down for vagueness in *Sweezy* v. *State of New Hampshire*, 354 U. S. 234. The Subcommittee's power to investigate "the extent, nature and effects of subversive activities in the United States" is patently quite the same as that vested in the New Hampshire legislature to investigate "with respect to violations of the subversive activities act of 1951 and to determine whether subversive persons as defined in said Act are presently located within this state." *Id.* at 236. This Court said that such a mandate was so "sweeping and uncertain" that it afforded "no assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry. The judiciary are thus placed in an untenable position * * *" *Id.* at 253, 254. See, also, *United States* v. *Peck*, 154 F. Supp. 603 (D. D. C.) where, on such grounds, Judge Youngdahl held Senate Resolution 366 void for vagueness.

In every case where convictions under 2 U. S. C. 192 have been sustained for contempts committed before the House Committee, this Court has required that the subject under inquiry be defined in terms more precise than those found in the authorizing resolution or a paraphrase of that resolution. See *Barenblatt* v. *United States*, *supra*, 360 U. S. at 124; *Braden* v. *United States*, 365 U. S. 431, 435;

McPhaul v. *United States*, 364 U. S. 372, 374, 381; cf. *Sacher* v. *United States*, 356 U. S. 576, 577. An equally precise statement was necessary but lacking here.

What inescapably emerges from the record in this case is that the Subcommittee gave no thought at all, at the hearing during which petitioner's contempts were allegedly committed, to the need for confining its inquiry to any particular subject. The hearing was held in March, 1956, more than a year before this Court decided *Watkins, supra*, and more than three years before it decided *Barenblatt, supra*. When it was held, the Court had yet to articulate the rule requiring Congressional committees to limit their inquiries to particular subjects, so that both witnesses and the courts might be enabled to determine the pertinency of the questions put. The Subcommittee did not consider it necessary so to limit its investigation. As was its then practice, it engaged in a general, roving inquisition.

It seems a minimal requirement, however, for a conviction under 2 U. S. C. 192 that a precise subject of inquiry shall have been determined by the Congressional committee antecedent to the committee hearing and certainly antecedent to the trial. The Government should not be permitted to prove a subject for the first time at the trial and independently of committee action and decision. To permit conviction on such proof would appear to violate fundamental rights of defendants in Federal criminal prosecutions.

In any event, the trial in this case likewise antedated the *Watkins* and *Barenblatt* decisions. And the Government's position at the trial, like the Subcommittee's at the hearing, was that it was quite unnecessary to show any particular subject under inquiry and sufficient only to show that the indictment questions were within the broad terms of the vague authorizing Resolution.

Contrariwise, the Court of Appeals endeavored to spell out a particular subject of inquiry because its decision

followed the rulings in *Watkins* and *Barenblatt*. The Court of Appeals' efforts, however, are futile not only because they are not supported by the record, but because they suffer from "the usual infirmity of *post litem motam*, self-serving declarations." *United States* v. *Rumely*, 345 U. S. 41, 48.

The Government having failed at the trial to show the subject under inquiry at the time petitioner testified before the Subcommittee and the trial court having failed to find that there was any particular subject under inquiry, the conviction of petitioner must be reversed.

Since there was no adequate proof of the subject of inquiry here, there was no proof that the indictment questions were "pertinent" within the terms of the statute.

* * *

The failure here to delimit the Subcommittee's subject of inquiry is fatal to the conviction of petitioner for another reason—because, contrary to "the requirement of the Due Process clause of the Fifth Amendment * * * the pertinency of the interrogation to the topic under * * * inquiry * * * [was not] brought home to the witness at the time the questions * * * [were]put to him." *Deutch* v. *United States, supra*, 81 S. Ct. at 1593.

The subject of inquiry was obscured at the time of hearing, first, by the generality with which the purpose of the inquiry was purportedly stated in the general references made: the "extent [to which] Soviet power operates through the Communist Party * * * and to what extent other organizations have been devised to effectuate its purposes" (R. 22); to "activities of Soviet agents and agencies" (*Ibid.*); "activities of the Communist Party" (R. 33); the Communist "conspiracy" (R. 36). Such references certainly could not afford any notice to the witness as to subject of inquiry intelligible enough to permit a reasonable determination as to the pertinency of particular questions put.

Nor were the few feeble attempts at specificity helpful. For, when Senator Eastland did particularize, his references

were so scattered and diverse as further to confuse. Thus, at one point, the Senator characterized the purpose of the Subcommittee's inquiry as an attempt "to see what amendments are needed to the Internal Security Act" (R. 33); at another, "as part of that * * * [to] tracing the activities of the Communist Party in the United States (*Ibid.*); and at still another point, "to know how this * * * [Communist] conspiracy is financed" (R. 36). At best, petitioner was left guessing by these variant comments as to the nature of the Subcommittee's inquiry.

It was a similar shifting of alleged subjects of inquiry that led this Court to reverse convictions for contempt both in *Watkins* v. *United States, supra,* and *Sacher* v. *United States,* 356 U. S. 576, the latter case involving this very Subcommittee. And these are the very considerations which led Judge Youngdahl to direct an acquittal in *United States* v. *Peck, supra,* a prosecution for contempt against a witness before this very Subcommittee, Judge Youngdahl saying (154 Supp. at 611):

> "That the question under inquiry was not 'luminous' to the witness is the result of the precise defects in the method of exercising legislative authority which were involved in Watkins * * * . In this case, too, the Subcommittee ranged over many subjects during the course of its investigations; did not clearly establish any lines of demarcation between series of investigations, and did not restrict its questioning of the witnesses to any one field. The witness could not be aware of the subject matter under inquiry because there was no subject, except for the broad, vague, general authority of the Subcommittee."

The Government has, however, contended that this argument is not available to petitioner because—so the Government insists—he did not expressly object on grounds of pertinency at the time of the Subcommittee hearing. In this regard, the Government points to the close similarity between petitioner's objections and those of the witness in

Barenblatt v. *United States, supra.* The circumstances of the two cases are, however, markedly different.

First, whatever the form of the objections here may have been, Senator Eastland regarded them when made as directed, at least in part, to the issue of pertinency. This is indicated by the manner in which he replied to the objections. When petitioner restated them shortly after the public session began, the Senator proceeded to explain why the questions being put to petitioner were "pertinent to this inquiry" (R. 32-33). Thus, petitioner's objections were sufficient in fact to "trigger off" the Subcommittee's obligation to make pertinency luminous to the witness. Unfortunately, however, Senator Eastland's endeavors were unavailing, for his explanations were in such general terms they fell far short of the standard for precision which this Court's decisions impose.

The case is different from *Barenblatt* in other significant respects. In *Barenblatt* (a) the "subject matter of the inquiry had been identified at the commencement of the investigation as Communist infiltration into the field of education"; (b) just prior to the witness' appearance, the scope of the day's hearings had been announced with even greater particularity; (c) the witness had heard the committee interrogate another witness, Crowley "along the same lines as he was evidently to be questioned"; and (d) the witness "had listened to Crowley's testimony identifying him as a former member of an alleged Communist student organization." 360 U. S. at 124-125.

None of these conditions was present in our case, and petitioner enjoyed no elaborate notification of the subject under inquiry such as was afforded in *Barenblatt.* First, as the Government admitted at the trial, there was no statement of subject under inquiry more precise than the vague broad terms of Resolution 366. Second, at no time was the scope of the hearing announced with any degree of specificity or particularity approximating the

announcement prior to the witness' appearance in *Barenblatt*. Third, petitioner heard no other witness testify before him, as in *Barenblatt*. Finally, petitioner heard no witness identify him as a member of a Communist organization, as in *Barenblatt*; and, so far as the record shows, no witness has ever so identified petitioner.

III.

Petitioner was unduly restricted in his right of cross-examination and right to make a full defense with respect to the issue of probable cause.

In prosecutions under 2 U. S. C. 192, "the court must accord to the defendants every right which is guaranteed to defendants in all other criminal cases". *Watkins* v. *United States, supra,* 354 U. S. at 208; *Deutch* v. *United States, supra,* 81 S. Ct. at 1595. One of those, fundamental to a fair trial, is the right to a reasonable cross-examination of the Government's witnesses. *Alford* v. *United States,* 282 U. S. 687; see *Reilly* v. *Pinkus,* 338 U. S. 269, 275-276. This right was denied petitioner on the trial of this case with respect to the vital issue of probable cause.

The testimony on which petitioner was denied an opportunity to cross-examine was that of Government witness Morris with respect to the cause for subpoenaing petitioner and was most material. This Court has made it clear that no person's appearance as a witness before a Congressional committee, at least where his First Amendment rights are concerned, may "follow from indiscriminate dragnet procedures, lacking probable cause for belief that he possessed information which might be helpful" to the committee. *Barenblatt* v. *United States, supra,* 360 U. S. at 134. Probable cause is relevant also to the judicial process of balancing the interest of the individual witness in

his privacy and silence against the interest of the public in his testimony. The essentiality of proof of probable cause to a prosecution under 2 U. S. C. 192 is demonstrated in Argument I of the brief for petitioner in *Shelton* v. *United States*, No. 9, this Term, which we adopt and to which we respectfully refer the Court.

Morris testified on direct that the Subcommittee had subpoenaed petitioner as a witness because it had received information concerning his so-called Communist activities (R. 75-76, 77, 78, 79, 80, 81). This information, Morris said, had been secured "from a very reliable informant • • • [o]ne whose information in the past proved to be so accurate that I would accept the information again" (R. 100). When, however, petitioner sought to inspect the information, insofar as it may have been in writing, by subpoena *duces tecum* issued to the Subcommittee counsel (R. 8-9), the trial court quashed the subpoena (R. 52-53). When petitioner tried to cross-examine as to its nature, details and sources, the court firmly cut off all such examination (R. 97-98, 100).

This was not a case such as *Barenblatt, supra,* where there had been prior testimony before the committee as to the witness' participation in Communist Party activities, thus supplying probable cause for his interrogation. See 360 U. S. at 115. No such testimony had been received as to petitioner. Only the information of which Government witness Morris testified at the trial furnished a basis for summoning petitioner.

No reason appears why Morris should have been accorded a higher status than that generally accorded Government witnesses, nor why his testimony should have been deemed sacrosanct. Yet, the trial court did accord him an extraordinary status. It would not permit petitioner to cross-examine to find out what kind of information Morris was talking about, where it had come from, whether

Morris' "informant" was a credible person, or, indeed, *whether the information ever did exist at all.* So far as we know, it may all have been the product of a fertile imagination. Petitioner was not permitted to examine. The trial court relied on the information and required petitioner to be bound without question. In view of the prior quashing of the subpoena for production of the Subcommittee's records, this meant a complete bar to inquiry into the supposed cause for subpoenaing petitioner and into the Subcommittee's urgent need to pry into his private affairs.

The Government's insistence that the information and its sources were confidential does not, of course, justify so drastic a curtailment of petitioner's rights. In a criminal prosecution, the fundamental right of cross-examination surmounts the so-called informer's privilege of the Government. *Roviaro* v. *United States,* 353 U. S. 53; *Jencks* v. *United States,* 353 U. S. 657; *United States* v. *Andolschek,* 142 F. 2d 503 (C. A. 2). As this Court said in *United States* v. *Reynolds,* 345 U. S. 1, 12, and reiterated in *Jencks, supra,* 353 U. S. at 671, " • • • since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense • • •." And, as Judge Learned Hand said, in *Andolschek, supra,* 142 F. 2d at 506:

> " • • • the prosecution necessarily ends any confidential character the [Government] documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon the criminal transactions, and those which may be only indirectly relevant • • •."

In *Barenblatt, supra,* the Court assumed the difficult function of balancing "the competing private and public interests at stake" in cases like the present one, recognizing how vital it was that a proper balance be struck lest a witness' constitutional liberties be unjustly invaded. The task is a delicate one, and the " 'subordinating interest of the State must be compelling' in order to overcome the individual constitutional rights at stake" (360 U. S. at 126-127). If, however, the accused witness be thwarted, as was petitioner in this case, from inquiring into the truth or very existence of testimony offered in support of the "subordinating interest of the State" and from demonstrating—by showing that, in fact, there was no cogent reason for compelling attendance before the committee—that the inquiry was not in aid of any vital national interest, there can be no fair balancing of the conflicting "private and public interests at stake." If, as in this case, the First Amendment rights of the individual are to be subordinated merely on the *ipse dixit* of a Congressional committee's counsel, the individual's rights must inevitably yield to any committee's self-serving avowal of the legitimacy and *bona fides* of its investigation.

Petitioner was here denied the right to that effective cross-examination and right to make a full defense guaranteed the defendant in every criminal case. Petitioner's conviction must consequently be reversed.

IV.

The charter of the Internal Security Subcommittee is unconstitutionally vague, thereby impairing petitioner's First and Fifth Amendment freedoms.

Counsel here have discussed this aspect of the case in the brief submitted by them for petitioner in *Price* v. *United States,* No. 12, this Term. In order to avoid repetition, we adopt and respectfully refer the Court to that discussion, appearing in Argument VI of the *Price* brief.

V.

The Subcommittee's inquiry was in violation of petitioner's rights under the First Amendment.

As we have previously demonstrated, *supra*, pp. 16-28, there was a total absence of proof at the trial of a particular subject of Subcommittee inquiry in this case.

The Court of Appeals nevertheless found the "subject of the investigation to be Communist Party tactics, infiltration and penetration into geographical areas and *into particular professional groups including communications media*" (280 F. 2d at 713, emphasis supplied). If that finding is correct, however, we are presented with a committee investigation in violation of First Amendment freedoms.

Again, in order not unduly to burden the Court with repetition, we adopt and respectfully refer to the discussion of this point in the brief for petitioner in *Shelton* v. *United States of America*, No. 9, this Term, pp. 29-57.

VI.

The tribunal before which petitioner allegedly committed the contempts charged was not a competent committee of the Congress.

The provisions of 2 U. S. C. 192 contemplate a tribunal duly authorized to sit as a committee of the Congress at the time the contempts charged were committed. For a "tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction." *Christoffel* v. *United States*, 338 U. S. 84, 90. Senator Eastland, however, was not duly

authorized and competent to sit as a committee, as he purported to do, when petitioner allegedly committed the contempts for which he was convicted.

A. Senator Eastland was not competent to sit as a committee of Congress by reason of failure to comply with Section 134(c) of the Legislative Reorganization Act of 1946.

The indictment explicitly alleges that the Subcommittee was conducting hearings "pursuant to the Legislative Reorganization Act of 1946" (R. 1). Section 134(c) of the 1946 Act (Aug. 2, 1946, c. 753, Tit. I, sec. 134(c), 60 Stat. 832, 2 U. S. C. 190b(b)), provides, as follows:

> "No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

It is undisputed that:

(1) when petitioner appeared before Senator Eastland in the afternoon of March 19, 1956, the Senate was in session (R. 125-126); and

(2) no leave was granted by the Senate for the Subcommittee to sit at that time (R. 125).

Consequently, it is clear that, at the time of petitioner's alleged contempts, Senator Eastland was sitting in violation of the controlling statute. In short, he could not then constitute a tribunal competent to act as a committee of the Senate.

The Government has suggested that the statutory restriction was intended only to control sittings of the standing committees proper and not of their subcommittees. Such a narrow reading, however, disregards the remainder of Section 134 of the 1946 Act (see 2 U. S. C. 72b-1 and 190b(a)), which makes it plain that the proceedings of subcommittees as well as of their parent bodies are contemplated. Moreover, to read the term "committee" so restrictively would be to compel reversal of the conviction here on another ground. For, the very statute for whose

violation petitioner here stands convicted (2 U. S. C. 192) also speaks only in terms of a "committee". If, therefore, "committee" is to be read to exclude "subcommittees", petitioner cannot be found guilty of violating that section.

The Government has also argued, and the Court of Appeals has noted, that the authorization in Senate Resolution 366, 81st Cong., 2d sess., under which the Subcommittee was first created, authorizes the Subcommittee "to sit and act at such places and times *during* the sessions, recesses, and adjourned periods of the Senate * * * as it deems advisable" (emphasis supplied). Such authorization, it is said, is inconsistent with and therefore effects a *pro tanto* exception from the general restriction imposed by Section 134(c) of the 1946 Act. There is, however, no inconsistency between that provision of Senate Resolution 366 and Section 134(c). Authority to sit "*during* the sessions" of Congress is something quite different from authority to sit while a house of the Congress "is in session." This becomes obvious if one compares Section 134(a) of the Act (2 U. S. C. 190b(a)) with Section 134(c) (2 U. S. C. 190b(b)). Whereas Section 134(a) authorizes each standing committee of the Senate to sit "*during* the sessions" of Congress "as it deems advisable"; section 134(c) (which, as codified, follows immediately on the former) prohibits any such standing committee from sitting, without special leave, while the Senate "is in session." It is clear therefore that the term "during the sessions" of Congress refers to periods after Congress has convened as contrasted with periods of recess and adjournment; whereas the term "is in session" denotes those periods when a particular house of the Congress is actively engaged and sitting in debate and deliberation.[9]

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[9] Moreover, it was not in fact Senate Resolution 366 (of the 81st Congress) pursuant to which the Subcommittee here was acting, but rather Senate Resolution 174, 84th Cong., 2d sess. And Resolution 174, though its grant of substantive authority is the same as that in Resolution 366, contains no provision permitting the Subcommittee to sit "during the sessions" of Congress.

That the Subcommittee itself so construes the Legislative Reorganization Act and considers itself bound by the restriction of section 134(c) appears from the testimony of its chief counsel, whom the Government qualified as an expert on the practice and procedures of the Subcommittee (see R. 82-83). Morris testified (R. 102):

> "• • • it was our practice that whenever the Senate is sitting, we automatically get leave to sit; and we have done that on every occasion we have held a hearing when the Senate was in session."

It is clear then that, in this case, the tribunal before which petitioner appeared (Senator Eastland sitting alone) was sitting without authority and in violation of the Legislative Reorganization Act of 1946.

Nor may one contend, as the Government has insisted and the Court below apparently found (280 F. 2d at 714), that petitioner is precluded from taking advantage of this infirmity because he failed to raise it when he appeared before Senator Eastland. As this Court said, in *Christoffel* v. *United States, supra,* 338 U. S. at 88: "In a criminal case affecting the rights of one not a member [of the Committee], the occasion of trial is an appropriate one for petitioner to raise the question." *United States* v. *Bryan,* 339 U. S. 323, is not to the contrary. There the Court held that a witness who had failed to produce records in response to a subpoena issued by a congressional committee could not subsequently excuse her failure to do so by suggesting the absence of a quorum when she had failed to note the absence of quorum at the time of her appearance. But the Court explicitly distinguished that case from one involving a witness' refusal to give oral testimony (339 U. S. at 322, n. 8). And while the absence of a quorum would readily be apparent to a witness when he appeared before a committee and so be a defect he might well be charged with noting at his appearance; the fact that the

committe had that day failed to secure special leave to sit could obviously not then be known to him.

The Court of Appeals concludes, however, that this infirmity in the authority of the Subcommittee "is not a matter available to * * * [petitioner] as a defense to his actions" (280 F. 2d at 714). We assume that the Court's ruling is based on the rationale advanced by the Government to distinguish the defect in this case from that which arises from the lack of a quorum, likewise fatal to an indictment under 2 U. S. C. 192. *Christoffel* v. *United States, supra.* The Government contends that the purpose of the Legislative Reorganization Act provision here in question was "apparently to assist Congress in securing the attendance of members at legislative sessions." Rather than, as in the case of the quorum requirement, "to protect the rights of a witness" (Br. in Opposition to Pet. for Cert., p. 12, n. 2).

Concern as to the attendance of members of committees at the sessions of the Congress is, however, the very consideration which makes section 134(c) of the Legislative Reorganization Act vitally significant to the Congressional committee witness. For, it is essential to such a witness that all committee members attend the hearings at which they are called to testify. The cases before this Court disclose how frequently in recent years questions at Congressional committee hearings have invaded the citizen's privacy. Where First Amendment rights are thus involved, the witness is entitled at the very least to careful weighing of his interest in maintaining his privacy inviolate against the interest of the Congress in securing information. See *Watkins* v. *United States, supra,* 354 U. S. at 198-199. Such a consideration involves a delicate balancing of the private and governmental interests involved. To the extent it can be achieved, that balancing should be done not by one, but by all of the committee members.

It is most unfortunate and palpably unfair to a witness that, as in this case, the interests which petitioner thought so important as to risk criminal prosecution for their preservation should have been weighed against the Congressional interests by only one committee member, Senator Eastland, rather than by all the committee members. It is not unreasonable to assume that, had the Senate not been in session at the time of the Subcommittee hearing or had the Senate granted leave to the Subcommittee to sit at that time, many if not all of the eight other committee members would also have been present. And that, had they been present, a majority would have concluded that the legislative purpose—whatever it may have been—was not so important as to outweigh petitioner's interest in remaining silent. Section 134(c) of the Legislative Reorganization Act of 1946, as we read it, is designed, at least in part, to achieve just this result and thus "to protect the rights of a witness" before a Congressional committee.[10]

B. Senator Eastland was not competent to sit as a committee of Congress in executive session by reason of failure to comply with Section 133(f) of the Legislative Reorganization Act of 1946.

Section 133(f) of the Legislative Reorganization Act of 1946 (Aug. 2, 1946, c. 753, Tit. I, sec. 133(f), 60 Stat. 831, 2 U. S. C. 190a(f)), provides as follows:

> "All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session."

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[10] Nor is it any answer to say that the infirmity in the Subcommittee's authority was cured by the Senate's later citation of petitioner for contempt. An incompetent committee cannot thus be vested with authority after the fact, at least so far as to support a criminal conviction for conduct occurring before an incompetent committee. *Cf. United States* v. *Rumely*, 345 U. S. 47-48.

In this case, however, the executive session in which petitioner's alleged refusals to answer the Counts 1 and 2 questions occurred, was not ordered by a majority vote either of the parent Committee on the Judiciary or of the Subcommittee. Rather, as the record discloses, it was Senator Eastland *alone* who decided to conduct the proceedings in executive session (R. 96).

In view of this circumstance, there can be no question that there was no competent tribunal sitting when petitioner was interrogated in executive session and allegedly refused to answer these two indictment questions.

The Government apparently concedes that the executive session at which the Counts 1 and 2 contempts allegedly occurred was unauthorized. It says only that since the other counts of the indictment involved questions put to petitioner at the open, public session of the Subcommittee, this infirmity as to the executive session is of no moment (Br. in Opposition to Pet. for Cert., p. 12). The Court of Appeals does not address itself at all to section 133.

What is significant here is the Government's readiness to concede the applicability of section 133 of the Legislative Reorganization Act of 1946, where, in its view, the judgment of conviction would not be affected, while, in the same breath, it insists that section 134 of that Act is unavailable to petitioner. Obviously, the requirement for Senate authorization in the latter case, that affecting the competence of Senator Eastland to sit while the Senate was in session, serves no less the protection of the committee witness than the requirement in the former case, that affecting the competence of Senator Eastland to sit in executive session. We submit that both provisions of the Legislative Reorganization Act were equally binding and

that the Subcommittee's failure to comply fatally impaired its authority to sit at all, during either of the sessions when petitioner appeared.

Consequently, the conviction of petitioner must be reversed.

VII.

The indictment was invalid because a majority of the Grand Jurors were Federal Government Employees.

Petitioner was indicted on November 26, 1956, by a grand jury in the District of Columbia, a majority of whose members were Federal Government employees. Petitioner moved to dismiss the indictment upon an affidavit affirmatively showing that, because of their fears by reason of the Federal loyalty and security programs, there was actual bias and prejudice on the part of such jurors. Alternatively, petitioner moved for a hearing at which he proposed to offer testimony to show such bias. These motions were denied.

The denial of those motions cannot be reconciled with the unquestioned right to an impartial grand jury. This right, implicit in the Fifth Amendment, has been expressly recognized by this Court. *Cassell* v. *Texas*, 339 U. S. 282, 298; *Pierre* v. *Louisiana*, 306 U. S. 354.

Contrary to popular opinion, the grand jury exercises the important function of protecting the citizen against unfounded accusation. "The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello* v. *United States*, 350 U. S. 359, 362. See the opinion of District Judge Weinfeld in *Application of United Electrical Radio & Machine Workers*, 111 F. Supp. 858 (S. D. N. Y.).

It is its duty to render a no bill unless probable cause exists to believe that a crime has been committed by the putative defendant. "[A] wrongful indictment inflicts a substantial harm on the indicted person * * *" *In re Fried,* 161 F. 2d 453, 465 (C. A. 2, per Frank, J.).

The very latitude which this Court has sanctioned in the evidence that may suffice for an indictment (*Costello* v. *United States,* 350 U. S. 359), makes it doubly imperative that no trace of partiality be found in the indicting body. Indeed, Mr. Justice Burton, concurring in that case, stated: "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment" (350 U. S. at 364).

In *Frazier* v. *United States,* 335 U. S. 497, the Court, in a five to four decision, held that the mere fact that members of a jury were Government employees would not disqualify them, but that they could be challenged for actual bias. That case did not involve loyalty-security issues. In *Dennis* v. *United States,* 339 U. S. 162, this Court rejected the argument that the loyalty procedures of the Government during the several months preceding the trial there *ipso facto* created bias and fear in the minds of Government employees acting as jurymen in a case involving allegations of Communist Party membership. The Court held that actual bias had to be shown and said, "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact" (339 U. S. at 168). In *Cammer* v. *United States,* 350 U. S. 399, however, when an attorney sought to investigate actual bias, he was convicted of contempt, and, although the conviction was reversed in this Court, his experiences hardly offer encouragement to counsel who would make a direct and private investigation of factual bias.

The only way which seems to remain to "raise a contention of bias from the realm of speculation to the realm

of fact" would seem to be the procedure which petitioner sought to follow in this case. If the District Court was right in denying petitioner's motion, the promise of this Court in *Dennis* is an empty one, and the fears expressed by the minority of the Court in *Frazier* are justified.

In what respects does this case differ from *Dennis*? The defendant in the *Dennis* case was directing his attack to the petit jury, but the considerations are of course the same. *Dennis*, however, was expressly decided on the ground that when the trial there was begun, the Government's loyalty program had been operative only three months (339 U. S. 162, 169). Under such circumstances, a majority of the Court was unwilling to take "judicial notice * * * of an aura of surveillance and intimidation which is said to exist in the District because of Executive Order 9835" (*Ibid.*). The Court took three facts into consideration in coming to this conclusion:

> (1) "the administrative implementation of Executive Order 9835 * * * was yet to come";
>
> (2) the individual jurors had explicitly denied that they would be influenced by the loyalty order; and
>
> (3) there was an "absence of any evidence which would indicate an opposite opinion among Government employees."

Before we point out that the instant case is distinguishable on all three points, a preliminary observation as to the views of the individual members of the Court seems appropriate, since *Dennis* has been consistently relied upon on this issue by the courts in the District of Columbia.

The opinion in *Dennis* written by Mr. Justice Minton was concurred in without qualification only by Chief Justice Vinson and Mr. Justice Burton. Mr. Justice Reed, while concurring, "reads the Court's opinion to mean that Gov-

ernment employees may be barred for *implied bias* when circumstances are properly brought to the court's attention which convince the Court that Government employees would not be suitable jurors in a particular case" (339 U. S. 162, 172-173).

While Mr. Justice Jackson concurred in the result in *Dennis*, he adhered "with increasing conviction" (339 U. S. 162, 173) to his dissent in *Frazier*. He was unwilling to give a special privilege to Dennis because he was a Communist.

Justices Black and Frankfurter wrote separate dissenting opinions. Justice Black said that "No juror can meet the test of 'impartiality' if he has good reason to fear that a vote for acquittal would subject him to harassing investigations and perhaps cost him his job" (339 U. S. 162, 175-176). Justice Frankfurter was of the opinion that the "pervasiveness of atmosphere in Washington" (339 U. S. 162, 182) even then, in 1947, was so great that government employees could not freely sit in judgment in "prosecutions inherently touching the security of the Government, at a time when public feeling on these matters is notoriously running high" (339 U. S. 162, 183).

While we urge upon this Court, without reservation, the views of Mr. Justices Black and Frankfurter, it is significant that the instant case is clearly distinguishable from that discussed in Mr. Justice Minton's opinion in *Dennis*:

> (1) In 1956, when petitioner here was indicted, the Federal Government's security and loyalty programs had been in effect nine long years rather than a mere three months. Everything that Mr. Justice Frankfurter suggested had become geometrically worse in the years between the date of his opinion, March 27, 1950, and the date of the indictment in this case, November 26, 1956. A recitation of the impact of the loyalty-security program upon government employees would literally take volumes. We deem it

sufficient to call this Court's attention to Association of the Bar of the City of New York, *Special Committee on the Federal Loyalty-Security Program* (1956); Brown, *Loyalty and Security; Employment Tests in the United States* (Yale Law School Lectures, 3) (1958); Bureau of National Affiairs, *Government Security and Loyalty; A Manual of Laws, Regulations, and Procedures* (1955); Shils, *The Torment of Secrecy; the Background and Consequence of American Security Policies* (1956); Commission on Government Security, Report Pursuant to Public Law 304, 84th Cong. as amended (1957); Watts, *The Draftee and Internal Security* (1955); Yarmolinsky, *Case Studies in Personnel Security* (1955).

(2) Since grand jurors, as well as petit jurors, were challenged in the instant case, there was no denial, as in *Dennis,* of bias; although we must state that we would regard such denial as unpersuasive for the reasons set forth in Justice Frankfurter's dissent in *Dennis.*

(3) Finally, it cannot be said that petitioner is disqualified for absence of evidence of fear among government employees. He attempted to establish such fear by his request for a hearing; he obviously cannot be penalized for the very error of the District Court to which he took explicit exception. This Court today can take judicial notice of the impact of nine years of the longest and most pervasive loyalty-security program in Anglo-American history.

Under these circumstances, we submit that the indictment should have been dismissed or, at the least, a preliminary hearing conducted on the effect of the loyalty-security program with the decision as the motion to abide the event.

In either case, the conviction must be reversed because of a fundamental and prejudicial error in the trial proceedings.

Virtually all of the considerations discussed above apply to the petit jury issue. Petitioner was convicted by a jury which included Government employees. He made an appropriate motion to disqualify them for cause (R. 10). Therefore the conviction must be reversed.

VIII.

The issue as to pertinency should have been submitted to the jury.

As we have indicated the Government at the trial adduced oral testimony on the issue of the pertinency of the indictment questions to the subject purportedly under inquiry by the Subcommittee at the time of petitioner's appearance. (See, *e.g.*, R. 75, 76, 77, 78, 79, 80, 81, 97-98 99). Notwithstanding petitioner's objections, the trial court refused to permit the jury to hear the testimony relating to this issue, refused to submit it to the jury, and reserved the issue for the court, ultimately determining it against petitioner (R. 53-54, 132). In doing so, we submit that the court erred and deprived petitioner of the trial by jury to which he was entitled.

Since the court did not grant petitioner's motion for acquittal at the end of the Government's case, the issue of pertinency was for the jury, since "all the elements of the crime charged shall be proved beyond a reasonable doubt". *Christoffel* v. *United States, supra,* 338 U. S. 89. The jury must determine all factual issues upon which there is any evidence though the evidence may be uncontroverted. *Hodges* v. *Easton,* 106 U. S. 408; *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11, 18, n. 10; *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 408; *Ex parte Milligan,* 4 Wall. (71 U. S.) 2.

We are aware that in *Braden* v. *United States*, 365 U. S. 431, 81 S. Ct. 584, 588, this Court, relying on *Sinclair* v. *United States*, 279 U. S. 263, 299, held that it is "proper for the court to determine the question [of pertinency] as a matter of law." We respectfully suggest, however, that the application of the *Sinclair* rule to a case such as the instant one is misplaced. *Sinclair* did not involve a situation where, as in the present case, "evidence *aliunde* was introduced to prove pertinency" (*United States* v. *Orman*, 207, F. 2d 148, 156 (C. A. 3)). In such a situation, the issue of pertinency becomes one of fact and its withdrawal from the jury is *pro tanto* a curtailment of the defendant's right to a trial by jury.

CONCLUSION

For the foregoing reasons, the judgment of conviction in this case should be reversed.

Respectfully submitted,

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APPENDIX

(Statutory Provisions Involved)

2 U. S. C. 192 (R. S. 102, as amended Act of June 22, 1938, c. 594, 52 Stat. 942) reads, as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers, upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

2 U. S. C. 190a (Legislative Reorganization Act of 1946, August 2, 1946, c. 753, Title I, § 133, 60 Stat. 831) reads, in pertinent part, as follows:

> "Committee meetings, hearings, records and reports
>
> • • •
>
> "(f) All hearings conducted by standing committees or their subcommittees shall be open to the public, except executive sessions for marking up bills or for voting or where the committee by a majority vote orders an executive session."

2 U. S. C. 190b (Legislative Reorganization Act of 1946, August 2, 1946, c. 753 Title I, § 134 (a), (c), 60 Stat. 831, 832) reads, in pertinent part, as follows

> "Authority of Senate standing committees and subcommittees; sitting while Senate or House in session
>
> • • •

"(b) No standing committee of the Senate or the House, except the Committee on Rules of the House, shall sit, without special leave, while the Senate or the House, as the case may be, is in session."

(Senate Resolution Involved)

Senate Resolution 366, 81st Cong. 2d Sess., reads as follows:

"Whereas the Congress from time to time has enacted laws designed to protect the internal security of the United States from acts of espionage and sabotage and from infiltration by persons who seek to overthrow the Government of the United States by force and violence; and

"Whereas those who seek to evade such laws or to violate them with impunity constantly seek to devise and do devise clever and evasive means and tactics for such purposes; and

"Whereas agents and dupes of the world Communist conspiracy have been and are engaged in activities (including the origination and dissemination of propaganda) designed and intended to bring such protective laws into disrepute or disfavor and to hamper or prevent effective administration and enforcement thereof; and

"Whereas it is vital to the internal security of the United States that the Congress maintains a continous surveillance over the problems presented by such activity and threatened activity and over the administration and enforcement of such laws.

"RESOLVED, That the Committee on the Judiciary, or any duly authorized subcommittee thereof, is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation and enforcement of other laws relating to espionage, sabotage, and the protection of the internal

security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."